No. 20744

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking Association, as Trustee, *Appellant,*

vs.

THE CROWN LIFE INSURANCE COMPANY, a Corporation, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

BRIEF OF APPELLEE

PRESTON, THORGRIMSON, HOROWITZ,
STARIN & ELLIS
FRANK M. PRESTON
EDWARD STARIN
Attorneys for Appellee

2000 IBM Building
Seattle, Washington 98101

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

No. 20744

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking Association, as Trustee, *Appellant,*

vs.

THE CROWN LIFE INSURANCE COMPANY, a Corporation, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

BRIEF OF APPELLEE

PRESTON, THORGRIMSON, HOROWITZ,
STARIN & ELLIS
FRANK M. PRESTON
EDWARD STARIN
Attorneys for Appellee

2000 IBM Building
Seattle, Washington 98101

INDEX

TABLE OF CASES

TABLE OF CASES (Continued)

STATUTES

TEXTS

No. 20744

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking Association, as Trustee, *Appellant,*

vs.

THE CROWN LIFE INSURANCE COMPANY, a Corporation, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

BRIEF OF APPELLEE

RESTATEMENT OF THE CASE

On December 1, 1959 Charles M. Clark applied in writing to the appellee for a policy of term insurance to age 65 in the amount of $300,000 (Exhibit 1 R-2). No premium payment accompanied this application and no binding or other receipt was issued. In fact, the application stated in Paragraph 21 thereof:

> "what amount was paid with this application? $ C.O.D."

Said application also contained the following provisions:

"(2) The policy applied for shall not take effect until it has been manually received and accepted by the owner and the first premium paid thereon * * *."

and

"(3) Acceptance by the owner of any policy issued on this application shall constitute approval of the provisions of the policy * * *."

On December 11, 1959 (Exhibit A-9 R 10-14) appellee issued its 27-year term policy, No. 835907, in the amount of $300,000 on the life of the said Charles M. Clark. On the front page thereof the following significant phrases appear:

"Expiry Date: The 11th day of December, 1986. Premium: NINE HUNDRED AND FORTY ... 97/100 DOLLARS payable in advance every three months, commencing on the 11th day of December, 1959 and terminating at the end of the 27th policy year or on the prior death of the insured.

Policy Years: Computed from the 11th day of December, 1959 which shall be the beginning of the first policy year."

The policy was likewise dated the 11th day of December, 1959.

The said policy was delivered to Clark and the first premium paid on December 18, 1959. On that date, however, Clark changed the premium payments from quarterly to yearly by executing the following request (Attached to Exhibit R-2 Pretrial Order CLK R-3) on December 18, 1959:

"Re. Policy No. 835907. I hereby request and authorize the Crown Life Insurance Company to make the following alterations in the provisions of this policy, effective as from the 11 day of December, 1959:

> "Change the premium to $3,586.50 payable on the 11 day of December in each year."

At that time the first year's premium of $3,586.50 was paid to appellee by check and the policy delivered to Clark (CLK R-60-61 Exhibit A-10 R 16-17 20-21).

While it may be true that appellant-beneficiary has never seen or examined the above described term policy, it was in the possession of the insured Clark from December 18, 1959 until surrendered in exchange for a converted policy on February 28, 1961.

On the latter date Clark executed a request for Change of Policy with respect to the term policy (Pretrial Order 45 CLK R 45-46, Exhibit A-5 R-16, also attached to Exhibit 2) reading in part as follows:

> "Convert policy to Guaranteed Equity Plan, $300,000, Annual Premium—Non Par effective 11, December, 1960."
>
> "It is agreed that the original application and policy and this request shall be read and taken together, and shall together form the basis of the Contract."

Thereupon appellee issued to Clark a guaranteed equity 30-payment life non-participating policy bearing the same number as the term policy and in the same amount of $300,000. (Exhibit 2 R-2) This policy was dated March 8, 1961 and further provided:

> "Premium: $8,344.50 during the first 26 policy years and $7,021.50 during subsequent policy years, payable in advance every twelve months, commencing on the 11th day of December, 1960 and terminating at the end of the 30th

> policy year or on the prior death of the insured. Policy Years: Computed from the 11th day of December, 1960 which shall be the beginning of the first policy year."

The original application (Exhibit 1 R-2) was also attached to this policy and Paragraph 21 of the converted policy reads:

> "At the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number *issued on the* 11*th day of December,* 1959 which is hereby cancelled." (Emphasis supplied)

It will be noted that the request for Change of Premium effective December 11, 1959, the Request for Conversion of the policy effective December 11, 1960 and Paragraph 21 above quoted, all are in or attached to and form a part of the policy sued on and are thus "contained in the four-corners of said policy."

Both the term policy and the converted policy contained the identical suicide clause reading as follows,

> "If the insured shall die by suicide, whether sane or insane within two years of the date on which this policy became effective, the liability of the Company hereunder shall be limited to a return of the premiums paid."

The suicide of the insured occurred December 7, 1961.

It should be noted that the only "date of reference" (using phrase which has been adopted by appellant but not found in any of the authorities), which is found anywhere in the converted policy and the documents attached thereto is December 11th.

APPELLEE'S ARGUMENT

In a87

In appellant's brief so many fallacious theories have been ascribed to us and so many words have been put in our mouths so to speak, that we think it well at this time to set forth again our contentions.

It is our contention that the suicide clause ran from the date on which the original term policy became effective which was its issue date of December 11, 1959. We did not and do not contend, as counsel suggests, that December 18, 1959, the date the policy was delivered, was the date such policy became effective. On the contrary, we contend that the provisions in the application that the policy did not take effect until it was delivered and the first premium paid merely held in abeyance and postponed the taking effect of the policy until those conditions were met and when they were met the policy became effective on the date of its issue, particularly, since this was the date the insurance began, as the cases generally hold. This is also in accord with the general rule of law that an insurance policy takes effect from its date of issue unless it be otherwise stated. *Wallace vs. World Fire & Marine Ins. Co.* (1947 Cal. D. Ct.) 70 Fed. Supp. 193 affirmed 166 Fed.2d 571 (9th Cir. C.) We did not and do not contend that the suicide clause ran from the date of the converted policy (December 11, 1960). We simply contend, that if appellant's argument that only the terms alone of the converted policy can be considered, was consistently followed, then everything, including the suicide clause, would run from December 11, 1960.

We contend arguendo that if an ambiguity existed as to the date from which the suicide clause

ran, it was proper to examine the intention of the parties as evidenced by their actions as to when the insurance began.

However, the trial court held (and we contend correctly) that the converted policy and its attachments and enclosures clearly made December 11, 1959 the date of issue of the original policy and the date it became effective. The enclosures referred to are:

(1) The request by Clark on December 18, 1959 to change the premium payment dates *effective from December* 11, 1959 and to change the premium to $3,586.50, payable on the *11th day of December in each year.*

(2) The request for conversion executed by Clark on February 18, 1961 requesting:

> "convert policy to Guaranteed Equity Plan, $300,000 Annual Premium—Non Par *effective 11, December, 1960.*"

(3) Paragraph 21 of the converted policy itself reads:

> "At the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued *in lieu* of one bearing the same number *issued on the* 11*th day of December,* 1959 which is hereby cancelled." (Emphasis supplied)

We agree with appellant's statement on page 26 of its brief that:

> "It is a well established rule that when a policy of life insurance is renewed or converted under circumstances as in this case, the contract of insurance between the insured and the insurer is considered to be a single continuing contract for purposes of determining the com-

mencement date of the suicide clause in the most recent policy; and the insurer may not utilize the date of issue or effective date of the most recent policy as such commencement date, for the purpose of establishing the defense of suicide."

We contend that the suicide clause which reads:

"If the insurer shall die by suicide, while sane or insane, within two years from the date on which this policy became effective, the liability of the company hereunder shall be limited to a return of the premium paid"

and RCW 48.23.260 (Washington Insurance Code) permitting a life insurer to limit its liability in the event of the insured's suicide "within two years from date of issue of the policy," are not inconsistent as the issue date *is* the date the policy became effective. Not only is the general law to this effect, but the Washington State Insurance Commissioner's approval of the forms of policies containing the first quoted clause above, is certainly persuasive evidence of his like construction. (See Exhibits A-7 and A-8.)

We contend that the date of December 1, 1959 urged by appellant as being the date the insurance began and the suicide clause began to run was not and never was intended by the parties to be the effective date of this insurance. We urge this for the following reasons:

(a) No binder or other receipt was given at that time.

(b) There was no payment or part payment of premium either by cash or note, the application referring to the transaction as a "C.O.D." one.

(c) No insurance was ever asked for, provided

for, paid for, or was in the contemplation of the parties for any period prior to December 11, 1959.

(d) The anniversary date of the insurance is clearly December 11th.

AUTHORITIES IN SUPPORT OF APPELLEE'S CONTENTIONS

The transaction is covered by the Insurance Code of the State of Washington, RCW 48.01 et seq. The terms of the policy are governed by the provisions of the Insurance Code if there is any inconsistency between such terms and the provisions of the Code. There is no such inconsistency in the case at bar.

A.

The applicable sections of the code are as follows: RCW 48.18.130 provides:

> "(1) Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this code pertaining to contracts of particular kinds of insurance. The commissioner may waive the required use of a particular standard provision in a particular insurance contract form if . . . (b) the contract is otherwise approved by him . . .
>
> * * *
>
> "(3) In lieu of the standard provisions required by this code for contracts for particular kinds of insurance, substantially similar standard provisions required by the law of a foreign or alien insurer's domicile may be used when approved by the commissioner."

RCW 48.18.140 provides:

> ". . . (2) A policy shall specify: . . . (d) the time at which the insurance thereunder takes effect and the period during which the insurance is to continue . . ."

(It should be observed that neither in this section nor in any other section of the code is there any requirement that the insurance contract recite the date of issuance of the policy.)

RCW 48.18.520 provides:

"Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended or modified by any rider, endorsement, or application attached to and made a part of the policy."

RCW 48.23.020 provides:

"(1) No policy of life insurance other than industrial, group and pure endowments with or without return of premiums or of premiums and interest, shall be delivered or issued for delivery in this state unless it contains in substance all of the provisions required by RCW 48.23.030 to 48.23.130, inclusive. This provision shall not apply to annuity contracts."

RCW 48.23.050 provides:

"There shall be a provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue, except for nonpayment of premiums and except, at the option of the insurer, as to provisions relative to benefits in event of total and permanent disability and as to provisions which grant additional insurance specifically against accidental death."

RCW 48.23.260 provides:

"*Limitation of Liability.* (1) The insurer may in any life insurance policy or annuity or pure endowment contract limit its liability to a determinable amount not less than the full reserve of the policy and of dividend additions thereto in event only of death occurring: . . . (b) as a result of suicide of the insured,

whether sane or insane, within two years from the date of issue of the policy . . ."

B.

Both the date of issuance and the date the converted policy became effective relate back to the corresponding date of the original policy.

The rule is stated in Appleman on *Insurance,* Vol. 1 § 369, p. 690:

"Where protection is first afforded through means of a short term policy, the court will take the date of the first contract as controlling."

Where from the terms of the policy it appears that the agreement between the insured and the insurer is that the new policy is a continuation of the old one, the date of the first policy is the controlling one. This rule has been uniformly applied by the courts. *Silliman v. International Life Ins. Co.* (Tenn) 174 S.W. 1131; *Western & Southern Ins. Co. v. Shelby* (Ind.) 194 N.E. 197; *Krebs v. Philadelphia Life Ins. Co.* (Pa.) 95 Atl. 91; *American Nat. Ins. Co. v. Thompson* (Tex.) 186 S.W. 254; *Sexton v. National Life Ins. Co.* (Colo.) 90 Pac. 58; *Wood v. Brotherhood of American Yeoman* (Iowa) 126 N.W. 949. The only exception is where the substituted policy is, in effect, a new and independent contract.

Although the suicide in the instant case occurred within two years of the date of the converted policy (which was December 11, 1960, as set forth on the face of the policy) it is clearly established by the authorities that the date of issuance and the effective date of the new, substituted or converted policy must be the date of issue and the date the original policy became effective. The suicide in this case

occurred well within two years of the date of issue of the converted policy and also well within two years of the date of issue of the original policy which must be considered as the date it became effective.

C.

The effective date or date of issue of an insurance policy insofar as it relates to a suicide clause in such policy must be that date which has been agreed to by the parties in the contract of insurance. This rule is clearly established by the decisions in the following cases: *Lloyd v. Franklin Life Ins. Co.* (9th Cir. 1957) 245 F.2d 896. There the application for life insurance was made December 6, 1952. The application requested that the policy be dated January 1, 1953, the insured paying premiums quarterly, commencing January 1, 1953. The date of the issuance of the policy was January 1, 1953. The insured committed suicide on Dec. 21, 1954. The policy provided that "if within two years from the date of issuance the insured . . . shall die by self-destruction, liability of the company shall be restricted to the amount of the premiums paid thereon." It appeared that, at the time of the application, the premium for a full month was paid by means of the delivery of a promissory note. The receipt further provided that the policy would be deemed effective as of the beginning of the first policy year as shown on such policy. The policy provided for the payment of premiums in accordance with rates in use by the company at the date of issuance. The application contained a special request that the policy be dated January 1, 1953. The plaintiff-beneficiary of the policy contended that it was rendered ambiguous (similar to the contention of the appellant in the

case at bar) by the inclusion of the application as part of the policy and delivery of the promisory note as payment for the premium for the first month, and that by reason of such ambiguity, the coverage commenced on the date of the medical examination which was December 11, 1952. It was alleged that dating the policy January 1, 1953, would have the effect of giving the company the benefit of the premium without any obligation on the part of the company for almost a month. The court found that there was no ambiguity in the insurance contract; that the claimed ambiguity was an attempt to suggest that the company's use of the words "January 1, 1953, which is the date of issue" and the words "First Policy Year Begins: January 1, 1953" were not sufficient to establish the date of issue. The court says:

> "But every other clause of the policy application and receipt point unmistakably to January 1, 1953, as the date of issue. If the written document be taken altogether, there is no other date which could be the date of issue. The policy is therefore clear and unambiguous. The Company has a right to have the agreement enforced as written."

The court goes on to point out that even though it was a binding contract by reason of the payment of the premiums on December 11, 1952, it did not prevent the parties from postponing coverage and the date of issue until January 1, 1953, by express agreement, and the parties did have an express agreement to that effect. The court points out that all of the features of the policy dated from January 1, 1953—payment of premiums, grace periods, determination of age, loan value, cash surrender value, application for non-forfeiture and loan value

tables, mortgage redemption provisions, as well as the incontestible and suicide clauses. The court says:

> "All of the cases that hold that the clauses of the policy refer not to the time of the actual execution of the policy or the time of its delivery, but to the date of issue specified in the policy itself. This is the day upon which, by agreement of the parties, the risk attached. Here the conduct of the company and the insured through the time from the application to the suicide of Lloyd was consistent with January 1, 1953, as date of issue. There was no ambiguity."

The case at bar is much stronger than the *Lloyd* case.

In the case at bar the application specifically recited that the insurance was not to become effective until the policy was manually delivered and accepted by the owner and the first premium paid thereon. No payment of premium accompanied the application. The application specifically provides that there was no amount paid with the application. The letters "C.O.D." which were inserted in the application indicated very clearly that the policy was to be delivered when the first premium should be paid.

In a dissenting opinion in the *Lloyd case,* Judge Healy took the position that the purpose of the suicide exclusion was to protect the insurer from one procuring insurance with the thought or intention of early suicide; that such purpose was achieved if the exclusion runs from the date of issue of the receipt of the first insurance premium. Judge Healy's dissent was based entirely upon the fact that the insured had paid the first premium on the policy at

the time of the application. It is clear as stated above that such a situation does not exist in the case at bar in that there was no premium receipt issued, there was no premium paid and the application by its terms expressly and unequivocably provided that there was to be *no insurance* until the policy was manually delivered and the premium paid.

The earlier case of *New York Life Ins. Co. v. Noonan* (9th Cir. 1954) 215 F.2d 905, involved an action upon a policy of life insurance containing a clause barring recovery of the principal sum if death by suicide should occur within a year of issuance of the policy. The application for the insurance was executed by the insured on June 15, 1951. For the purpose of giving the insured the benefit of a lower premium based on the insured's age, the application asked that the policy be written to take effect March 14, 1951. The policy issued contained a statement that the anniversary and insurance years were to be determined from March 14, 1951, the date as of which this policy should be deemed to take effect. Following this provision, the following appeared:

"In witness whereof the New York Life Insurance Company has caused this policy to be executed on June 22, 1951, which is its date of issue." It was held that there was no conflict or ambiguity; that the entire contract was set out in the policy and the application which was made a part of the contract. The court said that the policy was in effect from March 14, 1951, for "every purpose except the suicide and incontestability provision." The latter are on their face governed by the date of issue, which was specifically stated in the policy to be June 22, 1951; that the two dates March 14, 1951, and June

22, 1951, serve entirely different purposes, as is readily ascertainable from a reading of the instrument.

It is submitted that this decision clearly established the rule that the periods in relation to the suicide and incontestability provisions must be determined by what the parties themselves have agreed. In the case at bar it is very clear that the parties agreed that the date the policy became effective was certainly not earlier than the date fixed in the policy, namely December 11, 1959.

The same principle was applied by the court in *State Mutual Life Assur. Co. v. Stapp,* 72 F.2d 142. In that case it was held that where the suicide clause provided that "if the insured shall commit suicide within two years of the date hereof, sane or insane, this policy shall be null and void," the commencement of the policy was fixed as of the date on the face of the policy, notwtihstanding the existence of a provision that the policy would not take effect until it was delivered and the first premium paid. In other words, the court adheres to the principle that the language of the policy is controlling with respect to the date upon which the suicide clause is to commence.

In the case of *Byrum v. Equitable Life Assurance Society of the U.S.,* 180 Fed. Supp. 620 (affirmed per curiam) 274 F.2d 822, it was held that where the insurer issued life policies relating back to the date of application, but date of issue stated in policies was a later date and insured committed suicide more than two years after the effective date but less than two years from the date of issue, the policies were in effect from the efffective date for every

purpose except suicide and the incontestable provisions did not begin until date of issue, where the policy provided in so many words. The court speciifcally points out that such situation would not create any ambiguity, citing *inter alia, New York Life Ins. Co. v. Noonan* (9th Cir—1954) 215 F.2d 905, and *Crowley v. Travelers Ins. Co.* (5th Cir.—1952) 196 F.2d 315, also citing *Forrest v. Mutual Benefit Life Ins. Co.,* 86 N.Y.S. 2d 910, affirmed 89 N.Y.S.2d 488. In the last cited case the suicide clause limited the liability of the insurer in the event of suicide within one year of the "date of issue." The policy contained the words: "Date: 20 January 1947." The court held that the date of issue was the date stated, notwithstanding that the application directed that the policy year should commence on July 20, 1946; that the policy provides that the policy year began July 20, 1946, and that the first premium was paid for the year ending July 20, 1947.

It should be borne in mind at all times that in the case at bar there was no difference between the date of the policy, the date of the policy years, the due date for payment of the first premium, or the anniversary date. These were all specified in the policy as December 11, 1959. No other date is mentioned.

In *Franklin Life Ins. v. Bieniek,* USCA 3rd Cir., 312 F.2d 365, the insuring defendant sued on a life insurance policy on the ground that the application included false material statements made with knowledge of their falsity on the part of the insured. The further provision that "after two years from date of issue, this policy shall be incontestable, except for failure to pay premiums," was included in the policy. It became necessary to ascertain the

date of the issue of the policy. The policy did not define the date of issue as such. The heading of the policy contained the words:

"First Policy Year Begins March 13, 1958.

Expiry Date March 13, 1987."

The first premium was paid at the beginning of the first policy year, March 13, 1958. Subsequent premiums were payable on the anniversary of said date in every year thereafter. The policy was issued by the company on March 21, 1958. The question was whether or not the March 13 or March 21 date was the applicable one. The court held that the intention of the parties was quite clear that the March 13 date was the applicable one, and that to apply the subsequent date would impart an artificiality to the acts of the parties that they never intended, citing *Lloyd v. Franklin Life Ins. Co.,* 245 F.2d 896, supra.

Here again it should be pointed out that in the case at bar the first premium was payable on December 11, 1959. The policy was computed from December 11, 1959; the expiry date which was twenty-seven years thereafter was specified as the 11th day of December, 1986; and the policy was dated December 11, 1959.

It is submitted that there is clearly no ambiguity and, therefore absolutely no ground for construction.

The principle established by the preceding cases was also following in the earlier case of *Davis v. Fidelity Mutual Life Ins. Co.,* CCA 4th Cir., 107 F.2d 150.

The decisions of the state courts have been uni-

formly the same: *Harrington v. Mutual Life Ins. Co.,* 131 N.W. 246 (N.D.); *Anderson v. Mutual Life Ins. Co.,* 130 Pac. 726 (Calif.); *Potts v. Metropolitan Life Ins. Co.,* 2 A.2d 879 (Pa.); *Kampf v. Franklin Life Ins. Co.,* 161 A.2d 717 (N.J.)

Under the rule which has been uniformly followed, where the policy fixes the date of issuance or the effective date, the terms of the policy must control. In the case at bar, there is no reference whatsoever to any other date than December 11, 1959, unless it be the actual date of the converted policy which was March 8, 1961, and the date of the beginning of the first policy year under the converted policy which was December 11, 1960. The suicide took place within two years of either date. Under Paragraph 21 of the converted policy it is specifically agreed *"at the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number on the* 11*th day of December,* 1959, *which is hereby cancelled."* The request referred to specifically recites that alteration was requested to "convert policy to guaranteed equity plan, $300,000, Annual Premium—Non Par—Effective 11 December 1960." This request also contained the following:

> "It is agreed that the original application and policy and this request shall be read and taken together, and shall together form the basis of the Contract."

Again, in a request made December 18, 1959, which is attached to the converted policy, the following appears:

> "I hereby request and authorize The Crown Life Insurance Company to make the following

> alterations in the provisions of this policy, effective as from the 11th day of December, 1959. Change the premium to $3,586.50 payable on the 11th day of December in each year."

It is quite clear from all of the provisions of the document evidencing the contract between the insurer and the insured that the parties considered that the date of December 11, 1959, and of December 11 of succeeding years as the controlling date for all purposes. There is no ambiguity.

The fact that the statute RCW 48.23.260(1) (b) fixes the running of the two year suicide clause from the date of issue of the policy, while the policy provision refers to the date the policy became effective does not create any ambiguity or difficulty.

The Insurance Commissioner of the State of Washington approved Form H 122, the term policy, and Form H 162, the converted* policy (Exhibit A-7 and A-8). Both of these forms contain identical suicide clauses. Such approval by the Insurance Commissioner is a practical construction that for the purpose of the running of the suicide clause, the date the policy became effective and the issue date are the same. The significance of the Commissioner's approval is well illustrated in the case of *American National Ins. Co. v. Ingle,* 129 S.W.2d (Tex.) 426, where the court, in commenting on the effect of the Insurance Commissioner's approval of a policy form which differed from statutory requirements, said on p. 430:

> "If, on proper construction of the policy provision, it remains doubtful whether it is in sub-

---

* RCW 48.18.130 (1) and (3) make provisions for such approval by the Insurance Commissioner.

> stantial compliance with the statutes, that construction will be adopted which makes the contract conform to the requirements of the statute, rather than a construction that imputes an intent to disregard or violate the law, was held in *First Texas Prudential Ins. Co. v. Sorley,* (Tex. Civ. App.), 272 S.W. 346, 351."

The fact that the Insurance Commissioner has approved the use of the phrase "within two years of the date on which the policy became effective" in the suicide clauses of both policies indicates the consistency of the rules of the cases cited in this brief. The provision contained in the application that the policy shall not become effective until the first premium is paid and the policy is delivered establishes when the arrangement is to become a binding contract of insurance. When this is accomplished, the policy provisions as reconciled with the requirements of the statutes clearly establish, in this case, that the date the policy became effective and the issue date are the same, i.e., the date fixed on the policy which was December 11, 1959. This proposition is sustained by the authorities. *Rosenthal v. New York Life Ins. Co.,* 94 F.2d (8th Cir.) 675, and the annotations in 44 A.L.R.2d 472.

E.

The date of the application is neither relevant nor applicable.

There is nothing in the policy that was issued, nor in the application itself which could possibly lead to the conclusion that the date of issue of the policy or the date it became effective was the date of the application for insurance.

As pointed out above, the application by its ex-

press terms specifically states that the policy did not take effect until after payment of the premium and after the policy was manually delivered, which event took place on December 18, 1959. In *Pietruszynski v. Prudential Ins. Co. of America,* 203 N.E.2d 342 (Ill.), the court held that a life insurance policy took effect on the date stated therein and not on the date of the application for insurance, where no conditional receipt was given, where the application stated that it was to become a part of the policy and that in the absence of a conditional receipt, the insurance did not take effect until the policy was issued and the first premium was paid. There was a question as to whether or not the applicant for the insurance had paid a portion of the premium. However, the application contained the following question:

> "12, a, Amount paid in advance? Answer: $ C.O.D."

The policy also contained the following:

> "Policy Date: April 7, 1961."

The insured was an infant who died on April 4, 1961. The court held that the insurance did not become effective at the time of the application in view of the fact that there was no premium paid or conditional receipt issued. The court points out that no amount was shown in answer to 12, a, merely the letters C.O.D.

The Supreme Court of the State of Washington has held that in the absence of a specific agreement, the insurance does not become effective merely because an application for such insurance is made. *Basinski v. National Casualty Co.,* 102 Wn.2d 101, 209 P.2d 1007. In that case the application for accident insurance provided that the application would not

be binding until accepted by the secretary at the home office. The payment of the first premium was made to the agent and the application and the premium were forwarded to an authorized representative of the company and the application was accepted. However, prior to the acceptance, the insured was injured.

The court held that the insurer was not obligated to pay benefits by reason of the injury which occurred prior to acceptance at the home office.

The court says:

> "The application for the insurance and its acceptance would, under ordinary circumstances, constitute the contract. It will be observed that the application specifically provides that there is no contract made until it (the application) has been accepted by the secretary at the home office or by an agent duly authorized to issue policies. The testimony shows that the application was not accepted until after the respondent was injured, and the policy itself expressly states that it shall go into effect at a certain time, which was the day following the respondent's injury. From these papers it is plain that at the time the respondent was injured, there was no contract between the parties. But respondent's counsel orally argued that, when the application was accepted, a contract was made which related back to the time of making the application. If the proposition made by respondent had been unconditionally accepted, we would see much force in the argument, although there seems to be authority to the contrary. But here the only acceptance was that implied by the writing of the policy. That instrument expressly denies that the term of insurance shall begin at the date of the application, because it provides that it shall begin at

> noon of the 27th day of October, which was two days after the making of the application and one day after the injury. The appellant had a right to thus conditionally accept the application."

In the case at bar there was clearly no contractual relationship created by the application. The very terms of the application negate any inference that the application created any obligation or assumption of duty by the insurer. There was no premium paid and no conditional receipt issued. There was nothing to infer that the coverage would relate back to the date of the application or that such date would be considered as the date of issuance of the policy.

ARGUMENT IN ANSWER TO THAT OF APPELLANT

Appellant's first assignment of error takes up the question of whether parol or extrinsic evidence was admissible to prove any term or provision of the insurance contract. Since the trial court found ample evidence in the converted policy and its attachments that the parties intended the insurance to be effective from December 11, 1959, the argument on this point seems to be academic. However, if there had been an ambiguity in the contract, we suggest that the trial court would have been justified under the law to consider such evidence in order to arrive at the intent of the parties.

Appellant argues that December 1, 1959, the date of application, should be adopted as the date on which the insurance clause began to run. Reference is continually made to the "earliest date of reference," which phrase appears nowhere in the policy

or endorsement and is apparently a product of counsel's mind. The proposition that an applicant with no premium deposit, who later accepted without question a policy dated December 11, 1959 and who asked that the premiums be paid as of that date, who asked that a converted policy bear the same anniversary date each year, of December 11, and who later accepted the converted policy which stated that it was issued in lieu of a like-numbered policy bearing the same number issued on December 11, 1959, should be deemed to have wished or understood the insurance coverage to begin from the date of his application is completely unsupported.

Appellant contends for December 1, 1959 as the date the insurance was effective by arguing that appellee attached the application to the converted policy (with the other endorsements from the term policy) in order to utilize the aforesaid date of December 1, 1959 in establishing a "date of reference" between the two policies. The obvious purpose of attaching the application to the converted policy was to comply with RCW 48.18.080 reading,

> "*Application as evidence.* (1) No application for the issuance of any insurance policy or contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of the application was attached to or otherwise made a part of the policy when issued and delivered. This provision shall not apply to policies or contracts of industrial life insurance."

Appellant contends that if December 18, 1959 was the date the term policy became effective (the reference to it as the converted policy on page 50 of appellant's brief is obviously a mistake) then the suicide clause ran two years and seven days from

date of issue of the policy and was illegal and again claims that it is our position and construction that December 18, 1959 was the date the insurance became effective, which again we deny. Appellant's claim of the illegality of the suicide clause used is that it thus broadens and extends the suicide clause to the detriment of the insured. Its claim in this respect is based entirely on accepting December 18, 1959 as the date the policy became effective as fixed by its terms but, this was not the date the policy became effective. The application merely said that the policy should not take effect until received and the first premium paid. It did not add, "and when so received and paid, the date of receipt and payment shall be the policy's effective date." Under the law set forth previously such provision merely held in abeyance and suspended the taking effect of the policy on the issue date of December 11, 1959, until such condition had been met. With this in mind, it is clear that the statutory provision,

> ". . . as a result of suicide of the insured whether sane or insane within two years from the date of issue of the policy."

and the policy provision,

> ". . . within two years of the date on which this policy became effective."

are not in conflict at all, the state of law being that a policy is effective from its date of issue, unless otherwise provided.

Note that the application does not say that the date of delivery and payment shall be the date the policy becomes effective, but merely attaches a condition to be complied with before the policy became effective on its issue date. Such is the general state of the law where, as here, the policy does not pro-

vide otherwise. Far different is the case of *Shank v. Fidelity Mutual Life Ins. Co.,* Minn. 1945, 21 N.W. 2d 235, relied on so strongly by appellant in this assignment. There the policy attempted to limit coverage in case of air *service, travel* and *flight* where the statute only allowed limited coverage in air *service.* The case is obviously correct, but not applicable here.

In this case, the words "the date on which this policy became effective" are not inherently favorable to the insurer. They can be equally favorable to the insured. Moreover, the language of the suicide clause must be read together with the other provisions of the policy. As demonstrated above, the policy provisions read as a whole clearly indicate that the parties to the contract understood that the words "the date on which the policy became effective" and "date of issue" were the same. Moreover, it clearly appears in the case at bar that the policy language was approved by the Insurance Commissioner of the State of Washington. In the cited case, the policy was merely filed but there was no indication of approval by the Insurance Commissioner.

APPELLANT'S AUTHORITIES

Horowitz v. New York Life Ins. Co., (9th Cir. 1935) 80 F.2d 295.

This case has no application to the facts in the case at bar. There the first year premium was paid with the application and the policy stated that the premium for twelve months was paid, that the policy took effect as of the 29th of September, 1930, which date was the anniversary of the policy, and that a like sum was due on said date every twelve

calendar months thereafter during the life of the insured. In addition, the application stated that the insurance should take effect and be in force from and after the time the application was made and whether the policy was delivered and received by the applicant or not. The policy was not actually signed or delivered to the applicant until January 7, 1931, and the court rightly denied the company the right to maintain a cancellation suit more than two years after September 29, 1930. The following excerpt from the court's opinion at page 299 is of extreme interest:

> "This date of September 29, 1930, also appears in the policy as its 'anniversary' date which determines the applicant's then age and hence rate of premium. It fixes the day on which the future premiums are to be paid. It is a determining factor in the loan and surrender values and the dividend paying date. It determines the life of the policy itself if any premium is unpaid, for it starts the running of the days of grace before the insurance terminates.
>
> "So far as any date is of importance, the 'anniversary' date is paramount. It determines every feature of the insurance contracted for that can be affected by a date. Insurance is the only purpose of the contract."

Significantly in the case at bar the anniversary date of both the term and the converted policy is December 11th.

Mutual Life Ins. Co. of New York v. Hurni Packing Co., 263 US 617, 44 Supreme Court 90, 68 Law Ed. 235 (1923) is of no help to appellant. There the policy was applied for on September 2, 1915, issued on September 7, 1915, and delivered on September

13, 1915, but dated at the request of the insured on August 23, 1915. The insurance company sued to rescind the policy but delayed doing this until August 24, 1917. The court correctly held that such a suit had to be begun two years after the issuance of the policy. In reaching this conclusion the court said:

> "It was competent for the parties to agree that the effective date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did. Plainly their agreement was effective to govern the amount of the premiums and the time of their future payment, reducing the former and shortening the latter, and, in the absence of words evincing a contrary intent, we are unable to avoid the conclusion that it was likewise effective in respct of other provisions of the policy, including the one here in question."

The case of *Cantrell v. Prudential Ins. Co.,* 189 Wash. 99, 63 P.2d 509, is of no aid to the appellant. There the court held that the "date hereof" in an insurance policy was unambiguous and started the running of the suicide clause. The significance of the court's statement that had the

> "Policy in the case now before us, instead of using the words 'date hereof,' used an expression such as 'date of issue' or 'date when the insurance became effective,' a different question would be presented,"

lies in the fact that the applicant paid the first monthly premium and in such case the application stated that the insurance should take effect as *of the date of the application.*

Schwartz v. Northern Life Ins. Co. (9th Cir 1928) 25 F.2d 555 is apparently relied on by appellant be-

cause of the statement therein to the effect that a policy of insurance becomes effective on the date the risk commences. We most certainly agree and point out that the term policy in the case at bar fixes December 11, 1959 as the beginning of the first policy year.

As for the facts in the *Schwartz* case, the appellant on August 2, 1924 signed an application for insurance and *paid* by note the first year's premium. On the same day he was examined and passed by the Company's medical examiner. A conditional binding receipt was issued, likewise dated August 2nd, stating the insurance should take effect when a satisfactory medical examination of the applicant had been made.

The policy itself was not issued and delivered until August 14, 1924, but the next premium had been set at August 2, 1925. As against the Company's contention that the suicide clause did not begin to run until August 14, 1924, the court said:

> "From a consideration of all the provisions of the contract here in question, we reach the conclusion that the minds of the contracting parties met in fixing upon August 2, 1924, as the date from which the policy became effective and as the date upon which the risk commenced and the date from which began the year during which the policy might be contestable for suicide. It was for a year commencing with that date that the insured paid the premium, and August 2 was made the date of the payment of each annual premium thereafter and the date upon which the appellee's reinsurance in another company took effect."

The importance of the premium dates and periods covered thereby is well illustrated in *New York Life Insurance Co. v. Cohen,* (N.D. Ohio 1930) 48 F.2d

903, cited and quoted from by appellant. There the application was made June 28, 1928. The policy was dated July 6, 1928 and delivered July 20, 1928. The court in holding that the July 6 date governed, notwithstanding the provision that the insurance did not take effect until delivery of the policy and payment of the first premium, pointed out that the first premium period ended July 6, 1929, that the policy took effect July 6, 1928 and was dated July 6, 1928, and further emphasized that the insurance would go into effect at any time agreed on by the parties. Let us emphasize again that in the case at bar the date of December 11, 1959 was originally and continuously agreed upon by the parties as the date when the insurance went into effect.

The case of *Travelers Ins. Co. v. Wolfe,* (6th Cir. 1935) 78 F.2d 78, cited and quoted from by appellant, actually points up a situation like the academic question in the case at bar as to whether the insurance became effective on the issuance date of of December 11, 1959 or the delivery date of December 18, 1959. In the cited case a five-year term policy was applied for on September 26, 1927. The policy was issued October 10, 1927 and delivered on October 20, 1927 and the premium paid by note. The policy also provided that it should be effective from October 3, 1927 while the application provided that the contract issued should not take effect until the first premium was paid. The question arose on whether the second year premium was timely paid within the second year grace period. The court in holding that the effective date of the contract was October 3, 1927 and that, therefore, the policy had lapsed for non-payment of premium, said on page 80:

"It is briefly the plaintiff's contention that the provision in the application, which is made a part of the policy, is controlling; that by its terms the insurance contract did not come into existence until the policy was executed and delivered and the first year's premium paid; that having contracted for a five-year term, no less period of protection can satisfy the insurer's obligation, and in any event there is a conflict between the application and the policy out of which an ambiguity arises, which under familiar principles must be resolved against the insurer, by whom the contract was drawn. We have given careful consideration to this contention, but as we read the contract it is perfectly clear. Its effective date is October 3, 1927. This is the date which controls the payment of premiums, and the running of suicide, incontestable, and other clauses. There is no conflict between this provision and the provision in the application. Read together, they mean that the contract shall not take effect unless the first premium is paid while the insured is in good health, but that when it does take effect it operates from the date stated therein. This is the ordinary connotation of the terms used, and we see no occasion for giving them a strained construction."

To the same effect is *Shira v. New York Life Ins. Co.,* (10th Cir. 1937) 90 F.2d 953 cited by appellant. Here again the beneficiary urged that the date of delivery of the policy controlled as against the agreed date of January 2, 1930. The court held to the contrary. In that case the policy provided that it should take effect on January 2, 1930. The policy was dated January 7, 1930 and was delivered on January 16, 1930. The application had the usual provision that the policy should not take effect until delivered. The beneficiary contended that either

the date of January 7, 1930 or the date of January 16, 1930 was the effective date of the policy so as to avoid a lapse for non-payment of premiums, but the court held otherwise, saying on page 955:

> "The provision in the application does not fix the effective date of the insurance contract. It simply imposes a condition precedent to the taking effect of the insurance coverage. Furthermore, by an amendment to the application executed January 7th, the insured agreed that the insurance should take effect as of January 2, 1930. The language of the policy fixing the anniversary date and the date the policy should take effect is clear and unambiguous. Furthermore, the contract expressly provided that the initial premium would cover a period terminating on April 2, 1930 and that the insured should pay a like premium every three calendar months thereafter to maintain the policy. It is competent for parties to a life insurance contra to make such stipulations with reference to the effective date of the policy, the period which the initial premium payment shall cover and the times when the future premiums shall become due and such stipulations are binding on the parties. The condition in the application and the provision in the policy proper as to its effective date are not in conflict. When read together, they mean that the insurance coverage shall only take effect in the event the conditions specified in the application are fulfilled, and then as of January 2, 1930. *Travelers Ins. Co. v. Wolfe* (C.C.A. 6) 78 F.(2d) 78, 80 L.Ed. 452. We conclude therefore that the insured defaulted in the payment of a quarterly premium due on April 2, 1933."

The case of *Allick v. Columbian Protective Association,* (N.Y. 1945) 55 N.Y.S. 2d 438, affd. 64 N.E. 2d 350, cited by appellant, is concerned solely with

the question as to whether or not under the New York Statute an incontestable clause was available to the insured and is not ever remotely applicable to the case at bar.

Finally, appellant apparently relies on *Brun v. Northern Life Insurance Co.,* (1943) 16 W2d 564, 134 P2d 84. The court in that case, by a 5 to 4 decision, held that a provision for premium payments a month in advance did not necessarily mean the first of each month and that such a provision permitted the payment on any day up to the last day of the month and that the grace period began to run after the last day of the month. The holding is entirely pointless as far as the case at bar is concerned.

SUMMARY

The appellant contends that the policy in issue was ambiguous as to the commencement date of the two-year period of the suicide clause, but this contention is not supported by the evidence in this case nor by the decisions of the courts which have considered the question. The evidence is clear that the earliest applicable date referred to in the insurance contract was December 11, 1959. The decisions of the courts are practically unanimous that the commencement date of the suicide period is the date to which the parties have agreed. In the instant case ther is not only an express agreement as to the date of the original policy, there is a specific provision for the date as to which the premiums are to be calculated and the policy year is to commence. This date is clearly set forth as being December 11, 1959. It is submitted that on the basis of the criteria established by the evidence, the effective date and

date of issuance of the policy was December 11, 1959.

All of the above is contained in the writings attached to the converted policy, climaxed by Clause No. 21 thereof (virtually ignored in appellant's brief) reading:

> "At the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number *issued on the* 11*th day of December, 1959* which is hereby cancelled." (Emphasis supplied)

The judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

PRESTON, THORGRIMSON, HOROWITZ,
STARIN & ELLIS
FRANK M. PRESTON
EDWARD STARIN
Attorneys for Appellee

2000 IBM Building
Seattle, Washington 98101

CERTIFICATE OF ATTORNEY PREPARING BRIEF OF APPELLEE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank M. Preston
Attorney